**NO. 46935-9-II**

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KORAN RASHAD BUTLER, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 14-1-00453-4

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# OPENING BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court reject defendant's meritless claim of instructional error when it would have been improper to give the unanimity instruction he claims was required since there is only one means of committing identity theft in the second degree and the general verdict finding him guilty of that offense was amply supported by the evidence adduced at trial?

2. Has defendant failed to prove his counsel was ineffective for stipulating to an offender score that accurately counted his identity theft and forgery convictions as other current offenses since the different number of victims involved in each offense made the "same criminal conduct" exception inapplicable to his case?

3. Did the defendant forfeit the right to challenge the trial court's ruling on his ability to pay legal financial obligations pursuant to this court's decision in ***State v. Lyle***[1] when they were imposed over two years after the decision in ***State v. Blazina***[2] alerted him of the need to preserve the issue below?

4. Does the defendant erroneously claim that the reasonable doubt instruction the Supreme Court instructed trial courts to use in ***State v. Bennett***[3] misstated the jury's role when it properly instructs the jury that the State must prove all elements of the crime beyond a reasonable doubt?

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[1] ***State v. Lyle,*** __ Wn. App. __, __ P.3d __ (COA No. 46101-3-II) (2015 WL 4156773).
[2] ***State v. Blazina,*** 174 Wn. App. 906, 301 P.3d 492 (2013).
[3] ***State v. Bennett,*** 161 Wn.2d 303, 165 P.3d 1241 (2007).

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Koran Rashad Butler (hereinafter "defendant") with one count of identity theft in the second degree (RCW 9.35.020(3)), one count of forgery (RCW 9A.60.020(1)(a)(b)), and one count of attempted theft in the second degree (RCW 9A.56.040(1)). CP 1-2.

At the conclusion of the evidence, the trial court provided the jury with instructions, which included WPIC 4.01's standard instruction on the presumption of innocence and the State's burden to prove the elements of each offense beyond a reasonable doubt. CP 16. The jury found the defendant guilty of all three charges. RP4 198.

Both the identity theft and forgery convictions were counted as "other current offenses" in the stipulated calculation of the defendant's offender score. CP 72. The trial court imposed standard range sentences on each count and included $1,550 in legal financial obligations (LFOs) as part of the defendant's sentence. CP 51. Defendant filed a notice of appeal on November 21, 2014. CP 65.

2. Facts

On February 3, 2014, the defendant handed a check to a teller at a Heritage Bank in Tacoma, Washington. RP2 80. He had a young child with him at the time. RP2 113. The check was made out for $1,500 and was to

be paid to "K. Butler" for "auto work." RP2 78-80; Ex. 1.[4] Because the defendant provided an out-of-state driver's license, the teller sought manager approval before cashing the check. RP2 81. The teller gave the check to the branch's assistant manager, Marlene Wheeler. RP2 81-82.

Upon receiving the check, Ms. Wheeler compared the signature on the check to the account holder's signature the bank had on file. RP2 82. The account holder's signature on the check did not match the signature on file. RP2 82. At that point, Ms. Wheeler contacted another branch that was more familiar with Patricia Gann, the account holder on the check. RP2 83. That branch attempted to contact Ms. Gann to inquire as to whether she had written the check the defendant had presented. RP2 84. Ms. Wheeler contacted the Tacoma Police Department to report the incident. RP2 85.

Officer Ryan Koskovich of the Tacoma Police Department arrived at the bank and placed the defendant under arrest after discussing the check with him. RP2 114-119. The defendant claimed a woman he identified as "mom" had written the check for him and that mom's real name was "Gwendolyn, Patty or Patricia or something like that." RP2 118. When questioned about the child that was with him, the defendant said it was his friend's child, and referred to the friend as "Smiley." RP2 25. "Smiley" was later identified as Kareema Wright. RP2 120.

[4] Exhibit 1 is a copy of the check the defendant attempted to cash.

Officer Koskovich was able to contact Ms. Wright. RP2 120. Ms. Gann employed Ms. Wright as a caretaker for her husband, Joseph Gann, until January 2014. RP2 100-101. Ms. Wright formerly worked at the Ganns' home as a caretaker for Mr. Gann, sometimes without supervision. RP2 103. Ms. Gann did not write the check the defendant attempted to cash, she does not know the defendant, and he never performed "auto work" for her. RP2 104-105.

## C. ARGUMENT.

### 1. IT WOULD HAVE BEEN IMPROPER FOR THE TRIAL COURT TO GIVE A UNANIMITY INSTRUCTION BECAUSE THERE IS ONLY ONE MEANS OF COMMITTING IDENTITY THEFT IN THE SECOND DEGREE AND THE GENERAL VERDICT FINDING THE DEFENDANT GUILTY OF THAT OFFENSE WAS AMPLY SUPPORTED BY THE EVIDENCE.

#### a. RCW 9.35.020 only provides one means of committing identity theft in the second degree

Statutory interpretation is reviewed de novo. ***State v. Jacobs,*** 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The statute's plain meaning is given effect as an expression of legislative intent. *Id.* (quoting ***Dep't of Ecology v. Campbell & Gwinn,*** 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). Plain meaning is assessed according to the language's ordinary usage, the statute's context, and the statutory scheme's related provisions. ***Jacobs,*** 154 Wn.2d at 600. Interpretations leading to constitutional deficiencies or absurd results

should be avoided. ***State v. Eaton,*** 168 Wn.2d 476, 480, 229 P.3d 704 (2010).

In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged has been committed. ***State v. Petrich***, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). "The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime *when alternative means are alleged.*" ***State v. Emery,*** 161 Wn. App. 172, 198, 253 P.3d 413 (2011) (citing ***State v. Ortega-Martinez,*** 124 Wn.2d 702, 707, 881 P.2d 231 (1994)) (emphasis added). When there is sufficient evidence to support each of the alternative means of committing a crime, express jury unanimity as to which means is not required. ***State v. Owens,*** 180 Wn.2d 90, 95, 323 P.3d 1030 (2014) (citing ***Ortega-Martinez,*** 124 Wn.2d at 707-08). The legislature has not defined what constitutes an alternative means crime, therefore that determination is left to the judiciary. ***State v. Peterson,*** 168 Wn.2d 763, 769, 230 P.3d 588 (2010).

Use of a disjunctive "or" in a list of methods of committing the crime does not necessarily create alternative means of committing the crime. ***Owens,*** 180 Wn.2d at 96. Where the word "knowingly" relates to a series of verbs, its placement suggests only one means is intended. ***State v. Lindsey,*** 177 Wn. App. 233, 241, 311 P.3d 61 (2013).

The trial court was not required to give the jury a unanimity instruction because identity theft in the second degree is not an alternative means crime. RCW 9.35.020 only provides one means of committing identity theft in the second degree.

The statute proscribing identity theft reads in pertinent part:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or aid or abet any crime.
>
> . . .
>
> (3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree.

RCW 9.35.020. This statute contains the word "knowingly" and it relates to the verbs "obtain, possess, use, or transfer" that immediately follow. If each of those verbs was interpreted as standing alone, the word "knowingly" would only apply to "obtain." ***Lindsey,*** 177 Wn. App. at 241. If "knowingly" only applied to "obtain," identity theft would essentially become a strict liability crime if charged on the basis of possessing, using, or transferring financial information, but would have a mens rea requirement if charged due to the defendant obtaining financial information. *See* ***State v. Bradshaw,*** 152 Wn.2d 528, 537, 98 P.3d 1190 (2004). Such an

absurd result is contrary to Washington law governing statutory interpretation.

The Washington Supreme Court recently analyzed a statute containing language very similar to that of RCW 9.35.020(1) in ***State v. Owens***, 180 Wn.2d at 92. In ***Owens***, the court determined whether RCW 9A.82.050(1) provided alternative means of committing first degree trafficking in stolen property. *Id.* Washington's statute pertaining to trafficking in stolen property is made up of language very similar to that of the statute governing identity theft:

> A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050(1). The court held that the statute provided only two alternative means of committing first degree trafficking in stolen property. ***Owens,*** 180 Wn.2d at 98. The second means of committing first degree trafficking in stolen property is described in the clause "knowingly trafficking in stolen property." ***Owens,*** 180 Wn.2d at 97-98 (approving the analysis in ***Lindsey***). The ***Lindsey*** court interpreted the legislature's second use of the word "knowingly" to denote a second means of committing the offense. ***Lindsey,*** 177 Wn. App. at 241.

The ***Owens*** court held that "knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property" described one means of committing first degree trafficking in stolen property. *Id.* at 99 (reversing the Court of Appeals' holding that it described seven different means). The court held that the word "knowingly" applied to all seven of the verbs that followed it and that those seven verbs "represent multiple facets of a single means of committing the crime." *Id.* at 97 (quoting ***Lindsey,*** 177 Wn. App. at 241).

Applying the Supreme Court's analysis to RCW 9.35.020(1) leads to the conclusion that identity theft is not an alternative means crime. The clause "knowingly obtain, possess, use, or transfer a means of identification or financial information of another person . . . with the intent to commit, or aid or abet, any crime" describes the only means of committing identity theft. RCW 9.35.020(1) does not contain an additional clause associated with a second use of the word "knowingly." RCW 9.35.020(1). The conclusion that RCW 9.35.020(1) only provides one means of committing identity theft is consistent with the Court of Appeals' analysis in ***Lindsey,*** which was expressly adopted by the Washington Supreme Court in ***Owens.*** 180 Wn.2d at 98.

As the verbs "obtain, possess, use, or transfer" constitute multiple facets of a single means of committing the crime, if there is sufficient

evidence to convict the defendant due to him either obtaining, possessing, using, or transferring the financial information of another person, jury unanimity as to which of those four acts he committed is not required. ***Owens,*** 180 Wn.2d at 100-101.

b. Defendant's conviction for identity theft should be affirmed because the evidence supported each element of the offense by establishing that the defendant possessed and used the victim's financial information with the intent to commit theft.

A person is guilty of identity theft when it is proved that they (1) knowingly obtained, possessed, used, or transferred (2) the financial information of another person (3) with the intent to commit, or to aid or abet, any crime. RCW 9.35.020(1). A person commits identity theft in the second degree if they obtain credit, money, goods, services, or anything else of value worth $1,500 or less. RCW 9.35.020(2); RCW 9.35.020(3).

A person possesses financial information if it is in their personal custody. ***State v. Callahan,*** 77 Wn.2d 27, 29, 459 P.2d 400 (1969). "Use" is defined as "the fact or state of being used." ***State v. Truong,*** 117 Wn.2d 63, 72, 811 P.2d 938 (1991) (Brachtenbach, J., dissenting). A check that bears an account number and the owner's name qualifies as "financial information." RCW 9.35.005(1)(a); ***State v. Allenbach,*** 136 Wn. App. 95, 102-103, 147 P.3d 644 (2006). Intent may be inferred from the

circumstances surrounding the defendant's actions and from conduct that clearly indicates such intent as a matter of logical probability. ***State v. Couch,*** 44 Wn. App. 26, 32, 720 P.2d 1387 (1986) (citing ***State v. Lewis,*** 69 Wn.2d 120, 124, 417 P.2d 618 (1966)).

Evidence is sufficient if, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Owens,*** 180 Wn.2d at 99 (citing ***State v. Franco,*** 96 Wn.2d 816, 823, 639 P.2d 1320 (1982)). Viewing the evidence in this case in a light most favorable to the State, there is sufficient evidence for the trier of fact to convict the defendant based on his possession, use, or transfer of Ms. Gann's financial information.

The State provided evidence that the defendant possessed Ms. Gann's financial information through the testimony of Officer Koskovich and Marlene Wheeler. Officer Koskovich testified that bank employees identified the defendant as having the check in his possession when he handed it to the teller. RP2 113-114. Officer Koskovich also testified that the defendant had a Florida driver's license. RP2 122. Ms. Wheeler testified that the driver's license presented for the purpose of cashing the check was also from Florida. RP2 78. Finally, Officer Koskovich testified that he asked the defendant the address of his local residence. RP2 122. The defendant

provided the same address that was written on the check except for one digit in the house number. RP2 122. Viewing this evidence in a light most favorable to the State, a rational trier of fact could conclude that the defendant possessed Ms. Gann's financial information.

The State also provided evidence that the defendant used Ms. Gann's financial information through the testimony of Officer Koskovich and Marlene Wheeler. Ms. Wheeler testified that the teller brought her the check after it had been presented at the counter for cashing. RP2 80. The defendant also wrote his driver's license number, phone number, and local address on the check so as to comply with bank procedure for cashing checks presented by noncustomers. RP2 79. Finally, Officer Koskovich responded to the Heritage Bank after a report that someone was attempting to pass a fraudulent check, which indicates that the defendant was in the process of cashing the check when Officer Koskovich received the call. RP2 112. Viewing this evidence in a light most favorable to the State, a rational trier of fact could conclude that the defendant used Ms. Gann's financial information.

The State provided evidence that the defendant possessed and used financial information by admitting a copy of the check into evidence and through the testimony of Ms. Wheeler. A copy of the check the defendant attempted to cash was admitted as exhibit 1 at trial. Exhibit 1 provided the

jury with evidence that the check in the defendant's possession had Ms. Gann's account number printed on it. Ex. 1. Ms. Wheeler also testified that the check bore an account number associated with Patricia and Joseph Gann. RP2 77. Viewing this evidence in a light most favorable to the State, a trier of fact could reasonably conclude that the defendant possessed and used Ms. Gann's financial information.

The State established that the defendant had the intent to commit theft when he possessed and used the financial information of another through the testimony of Patricia Gann. Ms. Gann testified that although the check the defendant attempted to cash was hers, she is not the person who signed it. RP2 101; RP2 104. Furthermore, Ms. Gann testified that she did not know the defendant, and that he had never performed any auto work for her. RP2 105. Viewing this evidence in a light most favorable to the State, it shows that Ms. Gann never wrote a check for the defendant and that he was attempting to unlawfully deprive her of property by cashing the fraudulent check.

Despite the defendant's assertions to the contrary on appeal, the record also contains sufficient evidence for a trier of fact to conclude that the defendant transferred Ms. Gann's financial information. "Transfer" is defined as "to carry or take from one person or place to another." ***State v. Campbell,*** 59 Wn. App. 61, 64, 795 P.2d 750 (1990) (quoting Webster's

Third New International Dictionary 2426-27 (1971)). Ms. Wheeler testified that the check in question was brought to her by a teller. RP2 80. Officer Koskovich testified that the defendant was the person who gave the check to the teller. RP2 113-114. Viewing this evidence in a light most favorable to the State, a trier of fact could conclude that the defendant carried the check into the bank and gave it to a teller. Thus, the defendant carried the check to a new place and took it to another person. Both acts are sufficient to qualify as a transfer of financial information in violation of RCW 9.35.020(1).

RCW 9.35.020 contains only one means of committing identity theft. Therefore, if there is sufficient evidence to find the defendant guilty of identity theft in the second degree based on that means, a jury unanimity instruction was not required. Viewing the evidence in a light most favorable to the State, the record contains sufficient evidence for a trier of fact to find that the defendant both possessed and used Ms. Gann's financial information with the intent to commit theft. Thus, no unanimity instruction was required and the defendant's identity theft conviction should be affirmed.

2. DEFENDANT'S ATTORNEY PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE STIPULATED TO AN OFFENDER SCORE CORRECTLY COUNTING HIS IDENTITY THEFT AND FORGERY CONVICTIONS AS OTHER CURRENT OFFENSES WHEN THEY DID NOT ENCOMPASS THE SAME CRIMINAL CONDUCT.

To demonstrate a denial of the effective assistance of counsel, Defendant must satisfy a two-prong test. First, he must show that his attorney's performance was deficient. ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, 733 (1986) (quoting ***Strickland v. Washington***, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2054 (1984)). This prong requires showing that his attorney made errors so serious that he did not receive the "counsel" guaranteed to defendants by the Sixth Amendment. *Id.* Second, the defendant must demonstrate that he was prejudiced by the deficient performance. *Id.* Satisfying this prong requires the defendant to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. ***In re Davis***, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004). A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome of the trial. ***Strickland***, 466 U.S. at 694.

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Similarly, "[t]he defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the

proceeding would have been different but for counsel's deficient representation." *Id.* at 337 (citing ***State v. Thomas,*** 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

a. The defendant cannot show that his attorney's performance was deficient.

When asserting that an attorney's performance was deficient, a criminal defendant must show that the attorney's conduct fell below an objective standard of reasonableness. ***Strickland,*** 466 U.S. at 687-88. Judicial scrutiny of an attorney's performance must be highly deferential. *Id.* at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance..." *Id.* In evaluating an attorney's performance, courts must make every effort to eliminate the distorting effects of hindsight. *Id.* Counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. ***Davis,*** 152 Wn.2d at 673.

Under the SRA, each current conviction should be individually counted when calculating a defendant's offender score. RCW 9.94A.589(1)(a). However, "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." *Id.* Two offenses encompass the same criminal conduct if they require (1) the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. *Id.* If any of those three elements are missing, the crimes do

not constitute the same criminal conduct. ***State v. Maxfield,*** 125 Wn.2d 378, 402, 886 P.2d 123 (1994). If one crime involves more victims than the other, the convictions must be scored separately as victimizing more people constitutes more serious criminal conduct. ***State v. Dunaway,*** 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

The defendant's identity theft conviction involves two victims: Patricia and Joseph Gann. RP2 77. The defendant's forgery conviction involves three victims: Patricia Gann, Joseph Gann, and Heritage Bank. *See* ***State v. Calvert,*** 79 Wn. App. 569, 580, 903 P.2d 1003 (1995) (finding that both the account holder and bank were victims of a forgery involving fraudulent checks). As one of the defendant's crimes involves two victims, and the other involves three, the two do not encompass the same criminal conduct. Therefore, his identity theft and forgery convictions score against each other. ***State v. Freeman,*** 118 Wn. App. 365, 378-79, 76 P.3d 732 (2003) (affirming the defendant's sentence where his convictions did not encompass the same criminal conduct and were scored against each other).

The defendant has no prior convictions, therefore his offender score is derived entirely from his current offenses. CP 71. Each current offense scores a point against the other, meaning his offender score is one on both counts. The defendant's attorney stipulated that his offender score was one on both counts. CP 72. Thus, the defendant's attorney did not stipulate to an incorrect offender score. He stipulated to an accurate offender score.

"In general, a stipulation as to facts is a tactical decision." ***State v. Ashue,*** 145 Wn. App. 492, 505-06, 188 P.3d 522 (2008) (citing ***State v. Mierz,*** 127 Wn.2d 460, 476, 901 P.2d 286 (1995)). When defense counsel's conduct can be categorized as legitimate trial strategy or tactics, performance is not deficient. ***State v. Carson***, 179 Wn. App. 961, 976, 320 P.3d 185 (2014). "An attorney has no duty to argue frivolous or groundless matters before the court." ***State v. Stockman,*** 70 Wn.2d 941, 946, 425 P.2d 898 (1967). A reasonable attorney would interpret current case law to preclude a finding of same criminal conduct when the offenses involve a different number of victims. Failure to raise issues in anticipation of a change in the law is not grounds for a finding of ineffective assistance of counsel. ***State v. Pearsall,*** 156 Wn. App. 357, 362, 231 P.3d 849 (2010).

The defendant has failed to show how his trial counsel's performance fell below an objective standard of reasonableness. His claim is based on the erroneous belief that his attorney stipulated to an inaccurate offender score. Defendant's attorney actually stipulated to his correct offender score. Any argument to the contrary would have been meritless under the SRA and relevant case law. The decision to stipulate to an accurate offender score can be categorized as trial tactics, and the defendant's trial counsel had no duty to argue a meritless claim. The performance of the defendant's trial counsel was not deficient and therefore his conviction and sentence should be affirmed.

b. Defendant has not shown he was prejudiced by his attorney's performance at sentencing

To prevail on a claim for ineffective assistance of counsel, a "defendant must affirmatively prove prejudice, not simply show that 'the errors had some conceivable effect on the outcome.'" ***State v. Crawford,*** 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting ***Strickland***, 466 U.S. at 693). "In doing so, 'the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*

The defendant cannot show there is reasonable probability that but for his attorney's stipulation to his offender score, his sentence would have been different. As outlined above, the defendant's identity theft and forgery convictions do not encompass the same criminal conduct. Thus, they are not scored as one crime for sentencing purposes. RCW 9.94A.589(1)(a). The defendant's offender score was calculated correctly. Had his attorney not stipulated to an offender score of one, the trial court still would have calculated his score to be one on both counts.

When a defendant is being sentenced for multiple current offenses, the offender score for each offense is to be calculated as if the other current convictions were prior convictions. RCW 9.94A.589(1)(a). In the defendant's case, his offender score is one on both counts as his current

identity theft conviction scores against his current forgery conviction, and vice versa.

The defendant's offender score on both his identity theft and forgery convictions is one. His attorney stipulated to this fact, though if the offender score was not stipulated the result would have been the same. The defendant has not shown he was prejudiced by a deficient performance from his trial counsel, thus his claim of ineffective assistance of counsel must fail and his convictions must be affirmed.

3. DEFENDANT WAIVED THE OPPORTUNITY TO CHALLENGE THE TRIAL COURT'S IMPOSITION OF LFOs ON APPEAL WHEN HE FAILED TO PRESERVE THE ISSUE IN THE TRIAL COURT.

Defendants sentenced after May 21, 2013, have notice that failing to object to the imposition of LFOs at sentencing waives a related claim of error on appeal. ***State v. Lyle,*** __ Wn. App. __, __ P.3d __, (COA No. 46101-3-II) (2015 WL 4156773 at 2) (citing ***State v. Blazina,*** 174 Wn. App. 906, 911, 301 P.3d 492 (2013)). Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. *See* ***State v. Lindsey***, 177 Wn. App. 233, 247, 311 P.3d 61 (2013). Failure to object precludes raising an issue on appeal. ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).

An appellate court may grant discretionary review of three issues raised for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a).

To fall under the exceptions provided in RAP 2.5(a), a defendant would need to claim there was a manifest error—requiring actual prejudice—affecting a constitutional right. *See* ***State v. Lynn***, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Only if a defendant proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error. ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant has failed to provide any evidence of a manifest constitutional error, so this court should decline to exercise discretionary review under RAP 2.5(a).

When the trial court included LFOs in the defendant's sentence, defense counsel did not object. RP5 209. The defendant and his defense counsel had notice that failing to object to the imposition of LFOs waives a related claim of error on appeal as he was sentenced on November 7, 2014. *See* ***Lyle,*** 2015 WL 4156773 at 2. Normally, the lack of an objection during sentencing would preclude the defendant from challenging the imposition of LFOs on appeal. RAP 2.5(a); ***Guloy,*** 104 Wn.2d at 421.

Defendant relies on ***State v. Blazina,*** 182 Wn.2d 827, 344 P.3d 680 (2015), to assert that this court should exercise discretionary review under RAP 2.5(a) and review the trial court's imposition of LFOs. The ***Blazina*** court did choose to accept discretionary review of the claim of erroneous imposition of LFOs in that case, though it also held that "The error is unique to these defendants' circumstances, and the Court of Appeals properly exercised its discretion to decline review." ***Blazina,*** 182 Wn.2d at 834.

The Supreme Court did not hold that lower appellate courts should exercise discretionary review of LFOs as a general rule: "Each appellate court must make its own decision to accept discretionary review. National and local cries for reform of broken LFO systems demand that *this court* exercise its RAP 2.5(a) discretion and reach the merits of *this* case." *Id.* at 835 (emphasis added). Defendant was sentenced over a year after the Court of Appeals put defendants on notice that failing to object to the imposition of LFOs at sentencing waives a related claim of error on appeal. ***Lyle,*** 2015 WL 4156773 at 2. The systemic problems associated with LFOs that persuaded the Supreme Court to exercise its RAP 2.5(a) discretion in ***Blazina*** were addressed in that case and should not be reconsidered now.

Defense counsel did not preserve the issue of improper imposition of LFOs at the trial level. On appeal, the defendant has not shown the requisite manifest error affecting a constitutional right to invoke

discretionary review under RAP 2.5(a). The issue of whether the trial court erroneously imposed LFOs on the defendant is not properly before this court and should not be reviewed for the first time on appeal.

Defendant's unpreserved challenge to his LFOs also fails on the merits, for the court imposed them after making an individualized assessment into his ability to pay. All of the LFOs imposed on the defendant are mandatory except for the DAC recoupment and court costs. *See* ***State v. Thompson,*** 153 Wn. App. 325, 336-39, 223 P.3d 1165 (2009) (DNA fee is mandatory); ***State v. Williams,*** 65 Wn. App. 456, 460-61, 828 P.2d 1158 (1992) (crime victim penalty is mandatory). The legislature has deprived courts of discretion to consider the defendant's ability to pay when imposing mandatory LFOs. ***State v. Lundy,*** 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Thus, the only LFOs requiring an individualized inquiry in this case are the DAC recoupment and court costs.

At sentencing, the State requested $200 in court costs and a $1,500 DAC recoupment. RP5 206. The trial court imposed the $200 in court costs but reduced the DAC recoupment to $750 despite acknowledging that the representation provided for the defendant was worth more than $1,500. RP5 209. The sentencing court was also aware that the defendant was employed prior to his arrest, as he informed the court of this fact prior to being sentenced. RP5 208. The reduction in the DAC recoupment evidences the

trial court's due consideration for the defendant's ability to pay, making the amount imposed a reasonable exercise of the court's discretion which should be affirmed. ***State v. Baldwin,*** 63 Wn. App. 303, 312, 818 P.2d 1116 (1992) (trial court's determination of a defendant's ability to pay reviewed for clear error; decision to impose DAC recoupment reviewed for abuse of discretion).

4. THE TRIAL COURT'S REASONABLE DOUBT INSTRUCTION WAS PROPERLY GIVEN AS IT IS DERIVED FROM THE PATTERN INSTRUCTION WASHINGTON COURTS ARE REQUIRED TO USE IN ALL CRIMINAL TRIALS.

    a. The challenged "abiding belief in the truth of the charge" language is proper as it correctly states the jury's role and the State's burden.

In criminal trials, the jury instructions must convey that the State bears the burden of proving every essential element of the criminal offense beyond a reasonable doubt. ***State v. Bennett,*** 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). The instructions must properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *Id.* (citing ***State v. LeFaber,*** 128 Wn.2d 896, 903, 913 P.2d 369 (1996)). Challenged jury instructions are reviewed de novo and in the context of the instructions as a whole. *Id.*

The reasonable doubt instruction read to the jury in the defendant's case is identical to Washington's pattern instruction except for the insertion of names and dates. CP 16; WPIC 4.01. The Washington Supreme Court has approved of WPIC 4.01 and explicitly instructed lower courts to use it in all criminal trials. ***Bennett,*** 161 Wn.2d at 318. Furthermore, deviation from the pattern instruction has been held to be reversible error. *See* ***State v. Castillo,*** 150 Wn. App. 466, 475, 208 P.3d 1201 (2009) (reversing the trial court when a different instruction was used and directing it to use WPIC 4.01 in any retrial of the defendant).

By providing the jury with Washington's pattern instruction, the trial court was simply complying with the mandate of the state's highest court. To provide another instruction would have welcomed reversal on appeal and raised the possibility of a retrial.

On appeal, the defendant contends that this court should deviate from the Supreme Court's holding in ***Bennett*** because in ***Bennett,*** the court was faced with a challenge to the "abiding belief" language and not the "truth of the charge" language of the pattern instruction. Br. of App. at 15 n.8. Division One of this court has already heard and rejected the same argument. ***State v. Fedorov,*** 181 Wn. App. 187, 200, 324 P.3d 784 (2014). The *Fedorov* court held:

> [T]he "belief in the truth" phrase accurately informs the jury its job is to determine whether the State has proved

> the charged offenses beyond a reasonable doubt. . . . The reasonable doubt instruction accurately stated the law.

*Id.*

The defendant's reliance on ***State v. Emery*** to argue that the "truth" language of WPIC 4.01 misstates the jury's role is misplaced. *Id.* In ***Emery***, the improper remarks came during closing argument and expressly misstated the jury's role. ***State v. Emery,*** 174 Wn.2d 741, 760, 278 P.3d 653 (2012). In this case, the "truth" language was included in a jury instruction and therefore it must be read in the context of the instruction as a whole. ***Bennett,*** 161 Wn.2d at 307. When placed in context, the language of WPIC 4.01 accurately states the jury's role and therefore the instruction was proper. ***Fedorov,*** 181 Wn. App. at 200.

b. <u>The challenged "doubt for which a reason exists" language is proper as it does not require the jury to articulate a reason for having a reasonable doubt.</u>

A jury is not required to articulate a reasonable doubt in order to acquit a defendant. ***Emery,*** 174 Wn.2d at 760. The ***Emery*** court held that it was improper for the State to argue that the jury had to be able to "fill in the blank" with a reason for their doubt if they were to acquit a defendant. *Id.* The situation in ***Emery*** was recently distinguished from a claim of instructional error regarding the "doubt for which a reason exists" language

in WPIC 4.01. ***State v. Kalebaugh,*** __ Wn.2d __, __ P.3d __, 2015 WL 4136540, 3 (2015).

In ***Kalebaugh,*** the trial court instructed the jury that a reasonable doubt is "a doubt for which a reason exists" in accordance with WPIC 4.01. *Id.* The trial court then went on to further instruct the jury that a reasonable doubt is one "for which a reason can be given." *Id.* Although the court held that this additional instruction was improper, it also rejected the contention that WPIC 4.01 required the jury to express a reason for their doubt:

> We do not agree that the judge's effort to explain a reasonable doubt was a directive to convict unless a reason was given or akin to the 'fill in the blank' approach we held improper in ***State v. Emery***.

*Id.* This holding is consistent with over 100 years of Washington case law. ***State v. Thompson,*** 13 Wn. App. 1, 5, 533 P.2d 395 (1975) (citing ***State v. Harras,*** 25 Wn. 416, 65 P. 774 (1901)).

WPIC 4.01 does not require a jury to articulate a reason for their doubt. ***Thompson,*** 13 Wn. App. at 5. When read in context of the instruction as a whole, the "doubt for which a reason exists" language merely reaffirms that a jury's doubts must be based on reason. WPIC 4.01 accurately instructs the jury on the law and the trial court properly provided the jury with an instruction in accordance with the language Washington courts have

approved of for over 100 years. CP 16. The jury was properly instructed and the defendant's convictions and sentence should be affirmed.

D. CONCLUSION.

There is only one means of committing identity theft in the second degree, so an offense-specific instruction on unanimity was not required. A jury properly instructed on the State's burden of proof found him guilty of that offense and two others; one of which was another current felony accurately counted as an offender point due to the inapplicability of the "same criminal conduct" exception. Defendant also failed to preserve his meritless challenge to the trial court's imposition of LFOs by neglecting to raise it below. The defendant's convictions and sentence should be affirmed.

DATED: August 10, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

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Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.10.15 Theresa Kay
Date Signature

# PIERCE COUNTY PROSECUTOR

## August 10, 2015 - 2:33 PM

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